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Workers' Compensation Appeals Board
SAN FRANCISCO-RECONSIDERATION UNIT

BEFORE THE WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WANDA OGILVIE, Applicant, vs. **CITY & COUNTY OF SAN FRANCISCO, Permissibly Self-Insured,** Defendants.	**Case No.: ADJ 1177048** **PETITION FOR RECONSIDERATION**

The Applicant is aggrieved by the *en banc* decision of the WCAB (Board) and hereby petitions for reconsideration upon the following grounds:

1. By the Order, Decision, or Award, the Board acted without or in excess of its powers.
2. The evidence does not justify the findings of fact.
3. The findings of fact do not support the Order, Decision, or Award.
4. The decision violates the State Constitution, as enumerated below.

The background facts of the case and proceedings, both at the trial level and before the Board, are well known to the Board as set forth on pp. 2 - 7 of the *en banc* decision of February 3, 2009, are incorporated by this reference, and therefore will not be re-stated here.

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I.

THE FORMULA OUTLINED IN THE EN BANC DECISION IS NOT SUPPORTED BY THE EVIDENCE AND FURTHER DOES NOT MEET THE CONSTITUTIONAL MANDATE THAT THE LAW PROVIDE A SYSTEM THAT IS EXPEDITIOUS, INEXPENSIVE AND WITHOUT INCUMBRANCE.

A. THE BOARD METHODOLOGY.

Section F of the *en banc* decision describes a methodology under which "The DFEC Portion Of The 2005 Schedule May Be Rebutted In A Manner Consistent With Section 4660." Applicant contends that this methodology is not consistent with Section 4660. Further, inasmuch as the Board's methodology would delay any determination of an injured worker's diminished future earning capacity until at least three years after date of injury, Applicant contends that this proposed methodology – in a system where eligibility for temporary total disability benefits ends after two years for the vast majority of applicants – violates the constitutional mandate that the workers' compensation system "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character...." (California Constitution, Article XIV, Section 4.)

The Board's rebuttal methodology utilizes the ratios developed by RAND and included in Table B of the 2005 Schedule. (See Section II.B., following, for a description of these ratios.) Using the "Range of Ratios" from Table A of the 2005 Schedule, the Board's rebuttal methodology uses a four step process "To Establish The Injured Employee's Individualized Proportional Earnings Loss." (*Ogilvie*, page 21.) Step one is "to establish the employee's actual earnings in the three years following his or her injury." (*Id.*, page 22.)

This step is problematic for a number of reasons. First, by definition, this information will not be available until at least three years after the injury. Inasmuch as Labor Code §4656 limits temporary disability benefits to no more than 104 weeks within a five year period after the injury, this means many injured workers – including those who are most seriously injured and who collect temporary disability benefits for the 104 weeks immediately following the injury – will be forced to wait at least one year, and likely longer, without any compensation while waiting to make the determination of whether their disability warrants a rebuttal of a schedule rating using this DFEC methodology. To cause a worker to wait at least three years to begin the

process of rebutting the rating assigned under the schedule clearly violates the "expeditious" standard of the Constitution.

Furthermore, as acknowledged by the Board there are a number of reasons why the three year period may not be the appropriate period to assess post-injury earnings. The concept of earning capacity has been utilized in many areas of law for decades. Therefore, even after an injured worker waits three years to assess his or her actual earnings losses, it is virtually certain that one of the parties will challenge that data by asserting that a different post-injury earnings period or calculation method should be used in that particular case.

It is difficult to reconcile the Board's three year earning formula with its citation to and quote from *Argonaut v. Industrial Accident Commission (Montana)* 1962 57 Cal.2d 589 [27 Cal.Comp.Cases 130, 133]. Under *Montana* the actual post injury earnings were not dispositive of a prediction of what the employee's earnings would have been. This argues against the Board's reliance on three years of actual wages, and leads directly to the type of evidence presented by the Applicant's expert in this case, evidence that the trier of fact found persuasive.

Because the Board's methodology depends upon a number that is largely undefined, it will give rise to frequent litigation, with attendant delays and additional costs, as one party or the other attempts to show why different post-injury earnings are more appropriate and should be used. This violates the constitutional mandate to deliver "substantial justice in all cases expeditiously, inexpensively and without incumbrance...."

B. IT IS IMPROPER TO COMPARE THE "INDIVIDUALIZED RATIO" OF AN INJURED WORKER TO THE RATIO OF RATINGS OVER LOSSES IN TABLE A OF THE 2005 SCHEDULE.

The second step in the Board's methodology is to determine the post-injury earnings of similarly situated workers using aggregated data from the EDD, collective bargaining contracts, or other similar sources. This figure simulates what the individual employee could have earned absent the work injury. Step three is to calculate the individual employee's earnings losses by subtracting the employee's actual three year earnings from the three year earnings of similarly situated workers. The last step determines the proportional earnings loss by dividing the individual employee's earnings losses by the average three year earnings of similarly situated workers.

After establishing the employee's individualized proportional earnings loss, this percentage is divided into the *AMA Guides* impairment rating assigned to that employee "To Calculate An Individualized Ratio Of Rating Over Proportional Earnings Losses." (*Id.*, pages 26 - 27.) This "individualized ratio" is compared to the range of ratios of ratings over losses from Table A. If the individualized ratio falls within the range of ratios in Table A for the specific impairment (body part), the Board concludes that the DFEC component has not been rebutted. If the individualized ratio is outside of the range in Table A, the DFEC component has been rebutted and a new FEC factor is computed using the "numerical formula" of [(1.81 / a) x .1) + 1 that is taken from the 2005 Schedule. However, there are several fatal flaws in this analysis.

1. Ratios that are based on different rating schedules bear no relationship to each other and cannot be compared or equated for any purpose.

The theory purportedly underlying the Board's methodology is that the aggregate average ratios, as represented by the ratios in Table B of the 2005 Schedule, are made up of a group of individual ratios. In the typical situation, a large number of the individual ratios will be centered about the average, with a smaller number varying from the average by a small amount, while a few individual ratios will be "outliers" with a large variance from the average; this distribution forms the classic "bell curve." Comparing an individual ratio to the average ratio provides a measure of how much the individual ratio varies from the average ratio. The Board methodology attempts to use this measure of the variance between the individual ratio and the aggregate average ratio to determine whether the rating schedule has been rebutted.

However, Applicant contends that there is a fundamental flaw in the Board's proposed methodology; specifically that it is incorrect to compare the "individualized ratio" computed as described above with the aggregate average ratios in Table A of the 2005 Schedule. The reason is because the ratios in Table A represent the average rating assigned under the prior (pre-SB 899) rating schedule divided by the average proportional earnings losses of injured workers with that particular impairment. In contrast, the individualized ratio is the actual rating assigned under the *AMA Guides* divided by the proportional earnings losses of that worker.

Applicant agrees that a methodology might be developed under which an individual ratio is compared to the aggregate average ratio *of which it is a part*; in other words, where that individual ratio was – or at least could have been – one of the ratios used to compute the aggregate average ratio. However, comparing an individual ratio *to an aggregate average ratio*

made up of entirely different set of ratios is improper and mathematically meaningless. Consider the example used in *Ogilvie*: "a hypothetical 5% [*AMA Guides*] neck impairment rating and a hypothetical individualized proportional earnings loss of 0.83 or 83%...." (*Id.*, page 30.) This example had "an individualized rating to loss ratio of 0.060" (*Id.*, page 31), and because this ratio "falls well below any of the range of ratios within Table A of the 2005 Schedule" (*Id.*), the Board concluded that it rebuts the 2005 Schedule.

The problem is that the individualized ratio in this example was not a component of the aggregate average ratios represented in Table A, nor could it have been a component of any of those aggregate average ratios. The individualized ratio is based on an *AMA Guides* impairment rating and the aggregate average ratios represent ratings assigned under the prior rating schedule. These ratios are not comparable.

Consequently, the fact that the 0.060 individualized ratio in the Board's hypothetical example does not fall within the range of ratios based upon a fundamentally different rating schedule does not provide any information about whether that individualized ratio is an outlier that would justify rebuttal of the 2005 Schedule. The only comparison that has meaning would be to compare the 0.060 ratio for this hypothetical neck injury to an aggregate average of ratios based on *AMA Guides* impairment ratings.

2. The "numeric formula" utilized in the board methodology is not based on the evidence and is meaningless.

Applicant contends there is a second fundamental flaw in the Board methodology; specifically the use of the so-called "numeric formula" from the 2005 Schedule. According to the Board, the "minimum and maximum DFEC adjustment factors established by the Schedule were calculated by using the numeric formula **([1.81/a] x .1]) + 1,** where "**a**" corresponds to both the minimum and the maximum ratings to wage loss ratios from Table B of the Schedule. (2005 Schedule, at p. 1-6 [Paragraph (a)-4]." (*Id.*, page 20.)

Although it is ostensibly true that the cited formula mathematically defines the minimum and maximum FEC factors as adopted in the 2005 Schedule, actually this formula does not serve any purpose in establishing an empirically based schedule. As described in Section II.B., following, the purpose for computing the ratios in Table B was to develop a set of adjustment factors that, after application, would equalize the resulting ratios. Instead of using the methodology recommended by RAND, however, the Administrative Director (not the

Legislature) arbitrarily determined that the range of FEC adjustments would be 1.1 to 1.4. After making this arbitrary determination, the formula as set forth in the 2005 Schedule was developed to define this arbitrary range.

The only purpose of this formula is to justify the arbitrary choice of FEC adjustments. The "formula" is not based on the methodology recommended by RAND, nor does application of this "formula" result in equalized ratios. In fact, the initial data on the impact of the 2005 Schedule released by the Division of Workers' Compensation shows that ratings under the 2005 Schedule are even more inequitable than were ratings assigned under the prior schedule.

The problem with this formula can be seen by examining the proposed changes to the 2005 Schedule released by the Division of Workers' Compensation in 2008. The draft rating schedule includes new Tables A and B. These tables are based on newly computed ratios of aggregate average *AMA Guides* impairment ratings divided by proportional earnings losses for various body parts. The ratios range from a high of 2.462 for knee injuries to a low of 0.498 for ankle injuries.

The question facing the Board is: does its methodology work with these new ratios? Obviously using the formula from the 2005 Schedule would be inappropriate, since the average knee injury (with a new aggregate average ratio of 2.462) has a higher ratio than 1.81. Consequently, using the same formula would mean that the individualized ratio of rating over losses for the average knee injury would justify a rebuttal to the schedule, which clearly violates the announced intent behind the *Ogilvie* decision.

It could be asserted that the formula can and would be modified to reflect the new ratios. For example, the "1.81" in the current formula represents the highest ratio in Table B of the 2005 PDRS. Thus, it could be contended that a new formula of ([2.462 / a] x .1) + 1 would be applicable after adoption of the revised rating schedule. Using that formula the minimum and maximum FEC factors would be 1.10 and 1.49.

These figures demonstrate two problems with this modified formula. First, the minimum FEC factor remains unchanged at 1.10 despite the fact that the range of ratios has significantly changed. The reason is because mathematically this formula will <u>always</u> generate a minimum FEC factor of 1.10 (because the lowest FEC factor is <u>always</u> based on a computation that divides the highest ratio by itself). This fact – that the minimum FEC factor must always be 1.10 using this formula – demonstrates that the formula has no other purpose than to justify the arbitrary

selection of the 1.1 to 1.4 range of factors in the 2005 Schedule. Applicant contends that because the minimum FEC adjustment could never change from 1.10, this formula violates the Legislative mandate to adopt an empirically based schedule since adoption of an arbitrary and unchanging minimum FEC factor is clearly not based on empirical data.

Furthermore, the fact that the revised formula would create a range of FEC factors from 1.10 to 1.49 directly conflicts with the proposal by the DWC to increase the FEC factors in the revised schedule from a minimum of 1.2 to a maximum of 1.5. This range of proposed FEC factors, from 1.2 to 1.5, cannot be computed using the formula used by the Board in *Ogilvie*, nor is there any variation of this formula that Applicant is aware of that would produce the FEC factors in the draft revised rating schedule. In fact, the draft rating schedule does not include any similar rating formula. This means that it will not be possible to use the rebuttal methodology set forth by the Board in *Ogilvie* if and when the revised schedule is adopted.

Consequently, Applicant contends that even if the individualized ratio was correctly compared to an aggregate ratio computed on the basis of ratings assigned under the same rating schedule (and it was not, see previous section), this methodology would still be improper because "numerical formula" has no empirical basis and, in any case, will no longer be applicable in any variation after the schedule is amended, as required by statute, on or before January 1, 2010.

II.

THE EN BANC DECISION IS INCONSISTENT WITH PRIOR SUPREME COURT AND APPELLATE CASES, WITH THE AUTHORIZING STATUTE AND WITH THE ADOPTED RATING SCHEDULE ITSELF

Applicant contends that the *en banc* decision by the Board is inconsistent with case law in California which clearly demonstrates that the rating produced under the adopted rating schedule is rebuttable. The rating determined by Applicant's vocational expert did not rebut a portion of the rating formula but instead rebutted the Schedule rating in a manner consistent with case law. These cases stand for much more than just the rule that a schedule rating can be rebutted. The fundamental principle unifying these cases is that a worker's permanent disability rating must be rationally related to his or her true disability, which in the instant case means the rating must directly reflect the empirically based diminished future earning capacity of Ms. Ogilvie. Applicant contends that the rating developed by Applicant's vocational expert conforms

to both the letter and intent of Labor Code §4660 as amended by SB 899 which mandates that permanent disability ratings be empirically based. In addition, Applicant contends that the rating developed by Applicant's vocational expert is consistent with and conforms to the description of permanent disability as set forth in the Schedule for Rating Permanent Disabilities, January 2005 (2005 Schedule). Applicant is further aggrieved by this decision because it illegally limits the rebuttal methodology at further proceedings on remand.

A. THE RATING DETERMINED BY APPLICANT'S VOCATIONAL EXPERT REBUTTED THE RATING DETERMINED UNDER THE SCHEDULE FOR RATING PERMANENT DISABILITIES, JANUARY 2005.

As set forth by the Board in its *en banc* decision in *Costa v. Hardy Diagnostic (2006 en banc)* 71 CCC 1797 (*Costa I*), "This last provision [of Labor Code §4660], that the PDRS 'shall be prima facie evidence of the percentage of permanent disability to be attributable to each injury covered by the schedule,' has allowed the introduction of rebuttal evidence to ratings under the PDRS."

That finding by the Board in *Costa I* was based, in part, upon the California Supreme Court's decision in *Universal Studios, Inc. v. WCAB (Lewis)* (1979), 99 Cal.App.3d 647, 662 - 663 [44 CCC 1133, 1143], where the Court held that:

> "The percentage of disability determined by use of the rating schedule is only prima facie evidence of the percentage of permanent disability to be attributed to each injury. Thus, it is not absolute, binding and final. (Labor Code § 4660; *Liberty Mut. Ins. Co. v. Industrial Acc. Com. (Serafin)* (1948), *supra*, 33 Cal.2d 89 [13 Cal.Comp.Cases 267, 270].) It is therefore not to be considered all of the evidence on the degree or percentage of disability. Being prima facie it establishes only presumptive evidence. Presumptive evidence is rebuttable, may be controverted and overcome."

In *Costa I* the Board also cited *Glass v. Workers' Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297, 307 [45 Cal.Comp.Cases 441, 449], in which the Court held that:

> "The Board may not rely on the alleged limitations in the Rating Schedule to deny the injured worker a permanent disability award **which accurately reflects his true disability**. [Citations omitted.] While the Rating Schedule is prima facie evidence of the proper disability rating, it may be controverted and overcome." [Emphasis added.]

As also noted in *Costa I*, the *Glass* Court further explained that:

> "As explained and illustrated in Nielsen v. WCAB, 36 Cal.App.3d 756, 39 CCC 83, a rating that ignores the intangible or nonbodily element **is not rationally related to applicant's diminished ability to compete in the open labor market** as is required by Labor Code 4660. It is, therefore, arbitrary, unreasonable, and not supported by the evidence of the entire record." [Emphasis added.]

Courts in California have long equated permanent disability with diminished ability to compete in an open labor market. For example, in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246, [48 Cal.Comp.Cases 587, 597], our Supreme Court held that "a permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market." The Supreme Court provided further explanation of the meaning of permanent disability in *Livitsanos v. The Superior Court of Los Angeles County*, holding that "permanent disability payments are provided for permanent bodily impairment, to indemnify for future earning capacity or decreased ability to compete in an open labor market," citing *Russell v. Bankers Life Company* (1975) 46 Cal App 405, 40 CCC 894, and Labor Code Section 4660(a). (*Livitsanos v. The Superior Court of Los Angeles County* (1992) 2 Cal 4th 744, 57 CCC 355 at 360-361.) In yet another case, *General Foundry Service v. Workers' Comp. Appeals Bd.* (1986), 42 Cal.3d 331, 339, the Supreme Court stated that "[w]e share [the applicant's] concern that his permanent disability rating accurately reflect his diminished ability 'to compete in an open labor market.' (§ 4660.)"

These cases make it clear that under pre-SB 899 law the phrase in Labor Code §4660(a) requiring consideration of diminished ability to compete in the open labor market meant that the permanent disability percentage was the same as the percentage of the open labor market from which the applicant was precluded. The only amendment to §4660(a) was replacement of "consideration of the diminished ability of the injured worker to compete in the open labor market" with a requirement to consider "an employee's diminished future earning capacity." However, as demonstrated in the above quote from *Livitsantos* ("permanent disability payments are provided for permanent bodily impairment, to indemnify for future earning capacity or decreased ability to compete in an open labor market") it is clear that the Courts have drawn no

distinction between the impairment of future earning capacity and the inability to compete in the open labor market; they are essentially two ways of describing the same limitation to an injured worker. [See also: *Luchini v. Workmens' Comp. App. Bd.*, 7 Cal.App.3d 141, 144, "there is compensable permanent disability to the extent that an industrial injury causes a decrease in earning capacity or in the ability to compete in the open labor market...."; and *Moyer v. Workmens' Comp. Appeals Bd.* 24 Cal.App.3d 650, 657, "The words 'permanent disability' encompass not only impairment of the normal use of a portion of the body but, also, impairment of earning capacity and the diminished ability of the injured employee to compete in an open labor market. (Lab. Code, § 4660, subd. (a); [cites omitted].)"] In fact, over 75 years ago, under the statutory standard in §4660 of "diminished ability to compete in the open labor market," the Supreme Court held in *Marsh v. Industrial Acc. Comm.* (1933), 217 Cal. 338, 344, that "'disability' is an impairment of bodily functions which results in the impairment of earnings capacity."

The above cited cases demonstrate that it is the permanent disability rating produced under the rating schedule that is being rebutted, not a single element in the methodology chosen by the Administrative Director under the schedule. The rating schedule only represents *a* method to calculate a permanent disability rating, not *the only* method to do so. Further, once the evidence has been presented to rebut the rating produced under the schedule, as in this case, the trier of fact must then make a decision commensurate with all of the facts and evidence, including expert evidence regarding the ultimate percentage of diminished future earning capacity, to establish a rating that "accurately reflects" the "true disability" of the applicant. As pointed out in *Mihesuah v. WCAB* (1976) 41 CCC 81, at 87:

> "... the actual 'schedule' is no more than a convenient tabulation of the process it describes. According to its second paragraph, the formula itself is only a 'guide' to be employed in following and concluding the process... the final rating will be a result of **consideration of the entire picture of disability and possible employability**." [Emphasis added.]

Nothing in SB 899 suggests that the above cited longstanding decisions were nullified by the amendment of §4660(a). Instead, these cases support the position that to paraphrase *LeBoeuf*, under current §4660 as amended by SB 899 a permanent disability rating should reflect as accurately as possible an injured employee's diminished future earning capacity. Put another way, the percentage of diminished future earning capacity is the permanent disability percentage.

Once the rating produced under the schedule has been rebutted by the introduction of more accurate evidence in compliance with §4660, as determined in this case by the Workers' Compensation Judge (WCJ) in this case, the WCJ must be able to make a finding on permanent disability commensurate with all of the facts and evidence in order to award a permanent disability rating that truly reflects the applicant's diminished future earning capacity in accord with the line of cases cited above, and in accordance with the range of evidence doctrine as outlined in *U.S. Auto Stores, et al. v. WCAB (Brenner)* (1979), 4 Cal.3d 469 [36 CCC 173].

B. THE EVIDENCE DOES NOT JUSTIFY THE EN BANC DECISION BECAUSE THE PURPOSE OF THE "FEC" FACTOR IS NOT TO ADJUST THE IMPAIRMENT RATING ***FOR*** DIMINISHED FUTURE EARNING CAPACITY BUT INSTEAD TO ***CONVERT*** THE IMPAIRMENT RATING ***INTO*** DIMINISHED FUTURE EARNING CAPACITY.

Applicant further contends that the *en banc* decision is not justified by the evidence and is inconsistent with the letter and intent of the authorizing statute, Labor Code §4660 as amended by SB 899. The *en banc* decision contains an extensive discussion of the RAND study identified in §4660(b)(2), *Evaluation of California's Permanent Disability Rating Schedule, Interim Report* (RAND Report). It should be noted, however, that although the Legislature mandated that the Administrative Director base the revised schedule on the data and findings from the RAND Report, nothing in the subject statute limits the Applicant to the identical methodology employed by RAND, although the Applicant acknowledges the RAND methodology represents one reasonable approach under the statute.

The Board's focus on just a single feature of the RAND Report has resulted in the erroneous conclusion that only a "portion" of the current Schedule for Rating Permanent Disabilities (2005 Schedule) relates to diminished future earning capacity (DFEC). In fact, according to the RAND Report, diminished future earning capacity is the quantitative measure of the severity of a permanent disability. ("In this study, earnings loss estimates provide a direct measure of how a permanent disability affects an individual's ability to compete in the labor market." RAND Report, p. 18.) Thus, there is not a "portion" of the 2005 Schedule that relates to DFEC. Instead, the fundamental purpose of the entire schedule, and not just one individual factor, is to determine and assign a final permanent disability rating that is an accurate measure

of the injured worker's "true disability," which is quantified as the "diminished future earning capacity" of that worker.

The Legislature's intent that the amendment of Labor Code §4660 in SB 899 result in the adoption of an *empirically based* rating schedule is unmistakable; the word "empirical" is repeated three times in the two sentences of Labor Code §4660(b)(2). Requiring that ratings be empirically based means that ratings (and benefits) will be assigned in proportion to the underlying empirical data, which in the RAND Report are earnings losses caused by a work injury. Under an empirically based rating system, workers with relatively lower DFEC will receive lower ratings (and benefits) while workers with progressively higher DFEC should receive higher ratings (and benefits) *in direct proportion to their earnings losses*. This direct link between the underlying empirical data and the final assigned permanent disability ratings is the most fundamental, and most indispensable, feature of an empirically-based rating system.

However, another change in SB 899 requires that "'the nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of physical impairment and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition)." (Labor Code §4660(b)(1).) Accordingly, as described in the 2005 Schedule the first step in developing a permanent disability rating is to assign an impairment rating under the *AMA Guides*. This presents a challenge because, as noted by RAND, the impairment ratings assigned under the *AMA Guides* are not empirically based (RAND Report, p. 14) and "provide guidelines only for measuring impairment and say nothing about the extent that impairments limit work." (*Id.*, p. 13.) This means the *AMA Guides* impairment percentages do not provide an empirical basis for a rating schedule, nor do they have any connection to diminished future earning capacity.

According to RAND, "The rating schedule is used to convert the medical evaluation of an impairment into a quantitative measure of the severity of the disability." (RAND Report, p.8.) Thus, as defined by RAND, the purpose of the 2005 Schedule is **to convert** the non-empirical *AMA Guides* impairment percentage into an empirically based measure of diminished future earning capacity.

In the 2005 Schedule, the Future Earning Capacity (FEC) factor was purportedly intended for this purpose; **to convert** the impairment rating into a measure of DFEC. Importantly, the FEC factor was not adopted as a "DFEC factor;" it is not supposed to **adjust** the

impairment **for** DFEC.

The difference between **adjusting for** DFEC and **converting to** DFEC can best be illustrated, as in the *en banc* decision, by using an example. The table below includes data from Table 5 of the RAND study entitled "Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899" (2004 RAND Study). As noted by the Board, this data from the 2004 RAND Study underlies the ratios in Table B of the 2005 Schedule.

Type of Injury	Standard Rating Percentage	Proportional Earnings Losses	Ratio of Ratings Over Losses
Hearing	10.71%	17.69%	0.61
Upper extremity	17.89%	17.98%	1.00

A similar ratio of ratings over losses was developed by RAND for each of the 22 types of injury shown in Table B. A key point is that the purpose of these ratios is to evaluate the *equity* of ratings. Equity is achieved when workers who have different injuries but the same disability (*i.e.*, the same diminished future earning capacity) are assigned the same rating.

The ratios evaluate equity by comparing the average rating to the average proportional wage loss for different types of injuries. For example, for the two injury categories above, workers with hearing injuries had proportional losses of 17.69% and received an average rating under the pre-SB 899 schedule of 10.71%. Workers with upper extremity injuries had almost the same proportional losses of 17.98%, but received a much higher average rating of 17.89%.

This inequity – workers with these two injuries had the same proportional earnings losses but received much different ratings – is measured by the ratios calculated by RAND. For upper extremity injuries the ratio of 1.00 means that ratings under the pre-SB 899 PDRS were *equal to* the proportional losses. However, for hearing injuries the ratio of 0.61 means that ratings were *lower* (39% lower) than the proportional earnings losses. The lower ratio for hearing injuries signifies that lower ratings (and benefits) were provided for the same level of disability (as measured by proportional wage loss). And again, it must be stressed that the average ratings in these categories, indeed all of the data in the RAND report, are ratings under the prior (pre-SB

899) rating schedule and thus bear no relationship to ratings assigned under the 2005 Schedule.

RAND summarized the importance of these ratios as follows:

> "If the ratio differs across impairments, benefits are delivered differently for impairments of similar severity. For example, higher values of this ratio would be associated with higher benefits for an impairment relative to other impairments of similar severity." (RAND Report, p. 28.)

In other words, when the ratios are different, ratings are inequitable between injury categories. The corollary is that ratings are equitable when injury categories have the same ratio. In order to equalize these ratios (*e.g.*, achieve the same ratio for all injury categories) and thereby create equitable ratings, RAND recommended calculation of adjustment factors that would reorder ratings and benefits. (RAND Report, p. 44.) The methodology to accomplish this "reordering" is explained in the 2004 RAND Study as follows:

> "As discussed in [the 2003 RAND Report], a set of adjustments that equalized the relative values of losses and earnings, called *relativities*, would result in a constant ratio of ratings over losses. All relativities must be set equal to some baseline impairment, so this suggests that adjustment factors could be computed based on the ratio of ratings over losses for the baseline and for each individual category." (2004 RAND Study, p. 14.)

For the example above this RAND methodology can be used to calculate adjustments to equalize the ratios between hearing and upper extremity injuries. Adjustments are calculated by dividing the "baseline" ratio (which for this example is the upper extremity ratio) by the ratio for each category. For upper extremity injuries, the adjustment is 1.0000 (the "baseline" ratio of 1.00 divided by the upper extremity ratio of 1.00), while for hearing injuries the adjustment is 1.6436 (the "baseline" of 1.00 divided by the hearing ratio of 0.61). Applying these adjustment factors to ratings for upper extremity and hearing injuries would leave upper extremity ratings unchanged but would increase the average hearing rating to 17.61%. This would result in a ratio of adjusted ratings over losses of 1.00 for both categories, equalizing the ratios and creating equity for these two categories.

The important point is that these two categories had identical proportional earnings losses, but the adjustment factor – the FEC factor – is different. Because these two injury categories have the same proportional earnings losses, if the purpose of the FEC factor was to

adjust the impairment rating **for DFEC**, they would have the same adjustment factor. But that is not the purpose of the FEC factor.

Instead, as described the intent of this adjustment – the FEC adjustment – is to **convert** the rating into a measure of DFEC so that the resulting ratings are equitable. The FEC adjustment is not a measure of either earnings losses or impairment, but instead is based upon and calculated from the ratio of those two figures. The final product after application of this adjustment factor should be a rating that is an empirically-based measure of the severity of the disability (*e.g.*, the diminished future earning capacity) of all workers with the same type of injury as the injured worker. In other words, the outcome is not simply the rating adjusted **for** diminished future earning capacity, but instead the non-empirical impairment percentage has been **converted into** an empirically-based measure of diminished future earning capacity.

This conversion creates the direct link between the adjusted rating and DFEC, assuring that ratings (and benefits) are equitable; *e.g.,* that workers with the same DFEC will receive the same rating regardless of the part of body injured. In fact, that must be the test of any methodology used to develop ratings assigned to injured workers, whether it be the methodology used to develop a rating schedule or methodology used to rebut that schedule. If the methodology produces ratings that directly reflect diminished future earning capacity, that methodology conforms to the Legislative intent (as well as the intent of the RAND Report) that permanent disability ratings be empirically based. However, where a methodology produces ratings that vary widely for workers with the same DFEC, as does the process outlined by the Board in its decision (see Section II.C., below), that methodology violates both the letter and intent of §4660 as amended by SB 899.

C. THE 2005 SCHEDULE CONFIRMS THAT PERMANENT DISABILITY IS MEASURED BY THE PERCENTAGE OF DIMINISHED FUTURE EARNING CAPACITY.

In its decision on this case, the Board cited the WCJ's Findings and Award in which the WCJ quoted the following paragraph from the 2005 Schedule:

> "A permanent disability rating can range from 0% to 100%. Zero percent represents no reduction of earning capacity, while 100% represents permanent total disability. A rating between 0% and 100% represents permanent partial disability. Permanent total disability represents a level of disability at which

an employee has sustained a total loss of earning capacity."
(2005 Schedule, pp. 1-2 to 1-3.)

The Board then quoted the WCJ's statement that "A logical inference to be drawn from the foregoing ... is that the percentage of an injured worker's diminished future earning capacity could be the measure of the worker's permanent disability. ... For example, ... a 50% loss of earning capacity would justify a 50% permanent disability rating." (*Ogilvie*, p. 5.)

In fact, the WCJ is not only accurate, that is the only possible interpretation of the 2005 Schedule. The 2005 Schedule sets out two distinct and defined endpoints. A zero percent permanent disability rating is equal to a zero percent loss of earning capacity, and a 100 percent permanent disability rating is equal to a 100 percent loss of earning capacity (a "total loss of earning capacity"). Therefore, any intermediate percentage permanent disability rating between 0% and 100% in the 2005 Schedule must necessarily be equal to the corresponding percentage of diminished future earning capacity of the injured worker.

As noted by the Board, SB 899 also added a provision to § 4660 mandating that "[t]he schedule shall promote consistency, uniformity, and objectivity." (Labor Code §4660(d).) However, those mandates are not meant to operate in a vacuum. A schedule that awards $10,000 to every worker with permanent disability is "consistent, uniform, and objective" but clearly does not meet the intent to provide benefits that fairly reflect the injured worker's true disability. The 2005 Schedule defines a 0% rating as 0% diminished future earning capacity and a 100% rating as 100% diminished future earning capacity. Consequently, the only "consistent, uniform, and objective" way to assign ratings between those two limits is to assign ratings that are commensurate with the injured worker's diminished future earning capacity.

The Board's rebuttal methodology, however, develops ratings that vary significantly for workers with the same severity of disability as measured by DFEC. For example, an injured worker with a 50% DFEC could, under the Board's rebuttal methodology, receive a rating after adjustment for the FEC factor that varies from 10% to 58%. A worker with a 75% DFEC could receive an adjusted rating that ranges from 15% to 63%. And a worker with a 99% DFEC, a worker whose injury was so severe that the worker has just 1% of his or her pre-injury earning capacity, that worker could receive an adjusted rating as low as 19%, but the maximum rating for this worker could be only 63%.

At a minimum, the Board's rebuttal methodology violates the statutory standards of

"consistency" and "uniformity." Assigning widely fluctuating ratings to workers with the same severity of disability, or the same DFEC, is contrary to the intent of the Legislature's adoption of an empirically based schedule and directly conflicts with the case law cited above that requires the disability rating to accurately reflect the injured worker's true disability. Furthermore, by awarding different ratings and benefits to injured workers with the same severity of disability, the Board's methodology violates Applicant's constitutional rights to equal protection of the law and due process. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).)

D. THE BOARD'S ASSERTIONS THAT THE EMPLOYEE'S DFEC PERCENTAGE IS NOT TANTAMOUNT TO HIS OR HER PERCENTAGE OF DISABILITY ARE INVALID.

In its decision the Board asserts that "At Least In Most Cases, The Employee's DFEC Percentage Is Not Tantamount To His Or Her Percentage Of Disability." The "fundamental difficulty with this approach," according to the Board, is that if that if the Legislature wanted the percentage of DFEC to equal the permanent disability rating, "then why did the Legislature not say so?" Indeed, asked the Board, why have a schedule at all if a vocational expert's opinion could establish the permanent disability rating? (*Ogilvie*, page 13.)

The second question is easily answered. The Legislature directed adoption of a revised rating schedule because it did not intend to require a vocational expert's input and testimony in every case. A rating schedule provides a cost effective method of assigning ratings that also provides consistency and uniformity of ratings. However, none of those goals are compromised by the fact that permanent disability ratings under the 2005 Schedule should be a measure of the injured worker's diminished future earning capacity, because that is what is required by §4660.

Permanent disability ratings under the prior rating schedule were a measure of the diminished ability of the injured worker to compete in the open labor market. Under that prior schedule, the opinion of a vocational expert could establish the percentage of the open labor market from which the injured worker was restricted, and that percentage was the permanent disability rating. (See, for example, *Chevron USA vs. WCAB (Arnold)* 65 CCC 922.) The rating schedule will not become superfluous simply because ratings have been changed from a measure of inability to compete in the open labor market to diminished future earning capacity. A vocational expert could provide input and testimony to establish the permanent disability rating

under the prior schedule, and that did not eliminate the need for that schedule, and the fact that an expert can still provide input and testimony under the 2005 Schedule does not eliminate the need for the 2005 Schedule. The Board offers a false choice between the "Schedule or a Vocational expert in every case." Both the historical and present reality is that rebuttal evidence, in compliance with Labor Code Section 4660, may be necessary in those cases where the schedule does not produce a fair and accurate measure of the employee's permanent disability. The Applicant urges no other circumstance where rebuttal would be necessary.

As to the first question posed above, in its unequivocal mandate that the revised rating schedule be an *empirically based* schedule, and specifically that it be "based on empirical data and findings" from the RAND Report (see Labor Code §4660(b)(2)), the Legislature *did* say that the permanent disability percentage is the same thing as diminished future earning capacity. As described in Section II.B. above, the linkage between the underlying empirical data on earnings losses and the final assigned permanent disability ratings is the most fundamental, and most indispensable, feature of an empirically-based rating system.

Of course, the final rating must reflect all statutory considerations, so age and occupation adjustments must also be reflected in the final rating. But the rating schedule cannot be considered empirically based unless the final ratings are directly linked to diminished future earning capacity. Thus, in mandating that the Administrative Director utilize the RAND "findings and data" in adopting an empirically based rating schedule, the Legislature was directing the adoption of a rating schedule under which the injured worker's permanent disability rating will directly reflect the empirical measure of diminished future earning capacity.

Nor does the Board's contention that allowing vocational experts to testify would both "defeat the Legislature's intention to reduce costs" (*Ogilvie*, page 14) and "defeat the Legislature's intention to 'promote consistency, uniformity, and objectivity' in permanent disability determinations" (*Id.*) have merit. As noted by the Board, in SB 899 the Legislature chose not to amend or delete the provision that states the schedule is "prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." (Labor Code §4660(c).) This means, as held by the Board in Section II. B. of its decision, "The 2005 Schedule Is Rebuttable."

It is axiomatic that in any case in which the schedule rating is rebutted, the rebuttal rating will be different from the schedule rating – either higher or lower – and that some added costs

may be generated. By maintaining the prima facie status of the schedule, the Legislature recognized that no rating schedule can cover every possible contingency, and that fairness and equity demand that injured workers have the right to rebut the schedule when the evidence proves such deviation is appropriate. In fact, the Board itself acknowledged this reality in *Costa vs. Hardy Diagnostic (en banc)* 71CCC 1797. In any case, the fact that the Legislature chose to allow continued rebuttal to the schedule does not in any manner negate or contradict the fact that the Legislature also required adoption of an empirically based schedule under which the permanent disability rating is directly linked to the injured worker's DFEC.

III.

THE PERMANENT DISABILITY RATING CALCULATED BY APPLICANT'S DFEC EXPERT IS A MORE ACCURATE MEASURE OF THE TRUE DISABILITY OF THE APPLICANT AND THEREFORE REBUTS THE PERMANENT DISABILITY RATING ASSIGNED UNDER THE 2005 PDRS

Section 4660(a) requires that in determining percentages of permanent disability account must be taken of the nature of the physical injury or disfigurement. Under §4660(b)(1) this term must "incorporate the descriptions and measurements of physical impairment and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition)." (*AMA Guides.*)

However, while the statute requires that the nature of the physical injury or disfigurement must "incorporate ... the descriptions and measurements .. and the corresponding percentages of impairment" from the *AMA Guides*, the Whole Person Impairment percentage assigned under the *Guides* is not a measure of permanent disability; *e.g.*, diminished future earning capacity. According to the *Guides,* "The whole person impairment percentages listed in the Guides estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work." (*AMA Guides*, pages 4, 13; emphasis added.) The *Guides* continues, "Therefore, it is inappropriate to use the Guides' criteria or ratings to make direct estimates of work disability." (*AMA Guides*, page 8.)

The *Guides* give this example of the difference between a "whole person impairment" and "work disability":

> "Thus, a 30% impairment rating does not correspond to a 30% reduction in work capability. Similarly, a manual laborer with this 30% impairment rating due to pericardial disease may be completely unable to do his or her

regular job and, thus, may have a 100% work disability." (*AMA Guides*, page 5.)

This example illustrates that there is a fundamental difference between "whole person impairment" and "work disability," and that the WPI rating may or may not have any connection to the diminished future earning capacity of the injured worker. However, the *Guides* do describe a process under which work disability can be evaluated, such as in a workers' compensation case. The *Guides* states:

> "When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment." (*AMA Guides*, page 5, 21, 22.)

The *Guides* further notes that physicians can also describe work restrictions. (*Guides*, pages 22, 24.) In fact, according to the *Guides* a final report is not complete unless such factors are included in the physician's report; "A complete impairment evaluation provides valuable information beyond an impairment percentage, and it includes a discussion about the person's abilities and limitations." (*Guides*, page 15.)

The *Guides* also provides the methodology to determine disability once the physician(s) have identified the applicant's work limitations. When identifying disability, the *Guides* state:

> "A decision of this scope usually requires input from medical and non-medical experts, such as vocational specialists, and the evaluation of both stable and changing factors, such as the person's education, skills, and motivation, the state of the job market, and local economic consideration." (*AMA Guides*, page 14.)

In the instant case, "the WCJ equated applicant's permanent disability percentage to her DFEC percentage, as found by the vocational experts." (*Ogilvie*, page 12.) The *en banc* decision rejected this approach for several reasons, and those issues were addressed in Section II, above.

There is, however, an additional assertion by the Board that must be addressed. The Board concludes that "a vocational expert's DFEC percentage is not a 'numerical formula' within the meaning of section 4660(b)(2). This is because it is not based on aggregate empirical wage data, from EDD or other sources, that compares the post-injury earnings of an injured employee to the earnings of similarly situated employees." (*Id.*, pages 13 - 14.) These broad

statements appear to be directed not just at the reports offered in this case, but at any and all DFEC reports that may be submitted by vocational experts. However, there is no evidence provided by the Board to back up these assertions, nor does the Board provide any specific guidance as to what must be included in such a "numeric formula" to be within the meaning of section 4660(b)(2).

Actually, in this case the DFEC determination by both vocational experts was based on an analysis of aggregate empirical wage data. In fact, Applicant's expert utilized the identical aggregate earnings data used by the Employment Development Department in developing his estimate of DFEC. Inasmuch as the Board specifically cites "EDD earnings data" as the basis for the empirical data used in the RAND Report (*Id.*, page 21), and further identifies "EDD wage data" as appropriate for determining the post-injury earnings of similarly situated employees under its rebuttal methodology (*Id.*, page 23), this objection to the experts' report is misplaced.

Applicant agrees that the Board can disallow any DFEC rebuttal evidence that does not comply with all of the requirements of Labor Code §4660, including the specific language of §4660(b)(2). However, the Board cannot assert that only a single methodology – its own – can comply with those statutory requirements regardless of whether others may be found to be compliant with statute. In any event, such a mandate functions as a "rebuttal rating schedule" and is thus illegal. (See *Rea v. Workers' Comp. Appeals Bd. (Boostan)* (2005), 127 Cal.App.4th 625, 70 CCC 312; "The new procedures in *Milbauer I* are much more extensive than general legal conclusions or policies produced after interpretation of applicable statutes or law in the context of a specific case.") As in the instant case, where the report of the vocational expert fully complies with all statutory requirements, Applicant contends that the permanent disability rating determined by the expert rebuts the rating assigned under the 2005 Schedule, and further that the DFEC percentage is the percentage of permanent disability because it is a more accurate measure of the applicant's true disability.

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IV.

CONCLUSION

Applicant respectfully requests that the Board rescind its *en banc* decision of February 3, 2009 in Wanda Ogilvie's case for the following reasons:

1. It is not supported by the evidence because the rebuttal methodology advanced by the Board does not conform to the letter or intent of Labor Code §4660 which requires that permanent disability ratings be empirically based and instead would assign widely different ratings to workers with the same severity of disability as measured by diminished future earning capacity.

2. It is further not supported by the evidence because the Board's rebuttal methodology is based upon a comparison of two fundamentally different ratios and utilizes a formula that is not empirically based and will not be available after the schedule is revised as is required by statute.

3. It conflicts with *LeBoeuf, supra*, *Universal Studios, supra, Glass, supra*, and other cited appellate cases that permit rebuttal of the permanent disability rating assigned under the schedule, and not a individual component of the methodology underlying that schedule.

4. It also conflicts with the governing statute, Labor Code §4660, that requires permanent disability ratings be empirically based.

5. It is inconsistent with the Constitutional mandate that workers' compensation laws be construed liberally in favor of injured workers and that the workers' compensation system provide substantial justice in all cases expeditiously, inexpensively, and without incumbrance because it will foster extensive litigation with attendant high costs and lengthy delays for injured workers, and produce results violative of equal protection.

6. It requires on remand that the Applicant utilize an illegal rebuttal methodology, as enumerated above.

PRAYER

The Applicant respectfully requests:

1. That Board rescind the en banc decision in this case; and

2. That the Board immediately convene a Commissioner's Conference in this case to

assure uniformity of process in compliance with the Constitutional, statutory and decisional authority of the this State, and to reduce the costs of litigation throughout the State, and

3. All other and further action deemed necessary to comply with laws of this State.

Dated: February 19, 2009

Respectfully submitted,

Law Office of Joseph C. Waxman

By: _____
Joseph C. Waxman
Attorney for Applicant

VERIFICATION

I DECLARE THAT:

I am the attorney representing Applicant, Wanda Ogilvie, the above-entitled action and have read the contents of the foregoing document and that the matters so stated are believed to be true and correct, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I, Joseph C. Waxman, certify under penalty of perjury that the foregoing is true and correct.

Dated this 19th day of February 2009, at San Francisco, California.

Joseph C. Waxman

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 114 Sansome Street, Suite 1205, San Francisco, CA 94104.

I served the foregoing document described as: **PETITION FOR RECONSIDERATION**, to all the parties listed below, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Workers' Compensation Appeals Board *(via hand delivery)*
ATT: RECON UNIT
455 Golden Gate Avenue, Room 9328
San Francisco, CA 94102-7002

The Honorable Richard Newman *(via hand delivery)*
Workers' Compensation Appeals Board
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Executed on February 19, 2009, at San Francisco, CA. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Marianne M. O'Hara

Marianne Madden O'Hara